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REPORT TO THE AUDIT COMMITTEE

ROLE OF THE AUDIT COMMITTEE IN THE BID TO GOAL PROGRAM

INTRODUCTION

At its May 11, 2009 meeting, the Audit Committee heard a review of the outside audit of the City's three Bid to Goal (Gainsharing) and Pay for Performance Programs (collectively "Bid to Goal Programs") for Fiscal Year 2008. There are some differences between the Bid to Goal Programs, but they generally involve incentive payments to employees for meeting certain goals. The programs operate in the City's Water and Metropolitan Wastewater Departments by memoranda of understanding (MOU) with the affected employees.¹ The MOU have been ratified by all participating employee groups and by resolution of the City Council.²

Members of the Audit Committee expressed concern that bonuses under the programs were paid by the Departments without input from the Committee. The Committee has requested this Office clarify its responsibility with regard to these programs in light of the enactment of Proposition C at the June 3, 2008 election, which created the Audit Committee.

DISCUSSION

Two Bid to Goal Programs operate in the Water Department (Water Operations Division [Water Ops] and Water Customer Support Division [Water CS]) and one in the Metropolitan Wastewater Department [MWWD].³ The Water Ops Program ends June 30, 2009 and the Water CS Program ends June 30, 2011. The MWWD program, ratified by the City Council in November 2008, is intended to include the five fiscal years 2008 to 2012, but the Mayor may terminate the program anytime after completion of the first fiscal year of service after 60 days

¹ The two Departments were recently consolidated into the Public Utilities Department. We refer to them by their initial departmental and divisional titles in this memorandum.

² To the extent the MOU impact represented employees, the terms are subject to the meet and confer requirements of the Meyers-Milias-Brown Act.

³ The MWWD is the oldest of the programs, operating in various parts of the Department since 1997. In 2008, the City Council ratified the MOU to continue the program, extending it to cover all MWWD represented (AFSCME, AFL-CIO (Local 127), and MEA) and unrepresented classified employees. Resolution No. R-303097 (Nov. 8, 2007). The Water Ops Program MOU (effective July 1, 2004 through June 30, 2009) involves similarly represented employees and was ratified by the parties and City Council. Resolution No. R-299337 (June 14, 2004). The Water CS Program MOU (effective from July 1, 2006 through June 30, 2011) involves represented (AFSCME, AFL-CIO (Local 127), and MEA) and unrepresented classified employees, and was ratified by the parties and the City Council. Resolution No. R-302551 (April 27, 2007).

notice to the Department and the labor organizations. Efforts are underway to develop a new agreement for the entire Water Department mirroring the MWWD MOU.

The role the Audit Committee may play in relation to the Bid to Goal Programs is determined by the MOU controlling the programs, and whatever independent authority the City Charter provides to the Committee.

I. The MOU Requirements.

The MOU are contractual agreements between the City and the employee groups. All MOU contemplate that the employee groups will submit annual performance reports to their respective Department's Director, setting forth how employees have met or exceeded the goal objectives established in the BID accepted by the Manager (Mayor).⁴ All require auditor review of these performance reports to verify that the goals as reported were met. The actual amounts paid to employees are based on recommendations made by a Labor Management Committee and the degree of success in meeting group and/or departmental goals as verified by the audit.⁵ The final employee payouts are approved by Departmental Directors in accord with written departmental policies.

The MOU establish a limited role for an independent auditor - simply to review the annual reports of goal completion and achievement in order to verify that there is adequate documentation to support the reports' claims. The MOU do not require any particular independent auditor be used for this purpose. The MOU were negotiated before the Audit Committee existed and contemplate no role for the Committee in relation to the Bid to Goal Programs.

II. San Diego Charter Section 39.1.

At the June 8, 2008 election voters enacted Proposition C, amending the City Charter to add section 39.1. The section creates a new Audit Committee and defines its responsibilities.⁶

⁴ Water Ops MOU at 7-8; Water CS MOU at 8; MWWD MOU at 8-9.

⁵ Unclassified management employees are not eligible for payouts under these programs.

⁶ Section 39.1 provides that the responsibilities of the Committee include: "oversight responsibility regarding the City's auditing, internal controls and any other financial or business practices required of this Committee by this Charter. The Audit Committee shall be responsible for directing and reviewing the work of the City Auditor and the City Auditor shall report directly to the Audit Committee. The Audit Committee shall recommend the annual compensation of the City Auditor and annual budget of the Office of City Auditor to the Council and shall be responsible for an annual performance review of the City Auditor. The Audit Committee shall recommend to the Council the retention of the City's outside audit firm and, when appropriate, the removal of such firm. The Audit Committee shall monitor the engagement of the City's outside auditor and resolve all disputes between City management and the outside auditor with regard to the presentation of the City's annual financial reports. All such disputes shall be reported to the Council. The Council may specify additional responsibilities and duties of the Audit Committee by ordinance as necessary to carry into effect the provisions of this section."

Since the Audit Committee was created by the City Charter, the Committee may only exercise the authority expressly or impliedly conferred upon it by the Charter. *See* 3 McQuillin Mun. Corp. § 12.126 (3rd ed. 2008); *also Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1079-1081 (2004) [Mayor exceeded authority in directing the City Clerk to issue certain marriage licenses]. Accordingly, we look to the Charter provisions to determine whether the Committee has any authority over these Council-approved and ratified employee incentive programs.

Charter provisions are construed in the same manner by courts as are constitutional provisions. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 974-975 (2000). The principle determination is what voters intended in approving the provisions. Courts look first to the actual words of the enactments, giving “the usual, ordinary, and commonsense meaning to them.” *HowardJarvis Taxpayers Ass’n v. County of Orange*, 110 Cal. App. 4th 1375, 1381(2003). If the language is clear and unambiguous, the courts will presume the voters intended the meaning apparent on the face of the measure and end their inquiry. *Woo*, 83 Cal. App. 4th at 975. If there is some ambiguity in the language, courts may look to extrinsic aids, such as the information and arguments contained in the official ballot pamphlet, to indicate the voters’ understanding of the measure and their intent in passing it. *Id.* at 976. This Office follows the same process for this analysis.

Section 39.1 does not appear ambiguous in its description of the Committee’s scope of authority and responsibility. *See* n.6 for text of section 39.1. It specifies the Committee’s authority and responsibility as general oversight of City’s auditing and internal controls; direction and review of the work of the City Auditor; and recommendation and monitoring the work of, and resolving disputes with the City’s outside auditor. If the Charter requires it, the Committee may also have oversight responsibility over other City financial or business practices. While the City Council may specify additional responsibilities for the Committee by ordinance, those may only be “as necessary to carry into effect the provisions of this section.” S.D. Charter § 39.1.

Consistent with the plain language of the section, voters were informed that the ballot measure was to “more clearly separate the City’s internal auditing function from supervision of the Manager (Mayor) by creating the new office of City Auditor, which would be supervised by a restructured Audit Committee The Auditor would perform the City’s internal Audits and investigations The Audit Committee would oversee the City’s internal auditing and control practices; direct the Auditor’s work; and recommend the City’s outside auditor, monitoring its work.” Ballot Pamp., Mun. Prim. Elec. (June 3, 2008) City Att’y Impart. Analysis.

The Charter does not contemplate that the Committee have approval authority over audits or to have control over City departmental programs negotiated by others. “Oversight” responsibility, such as that given to the Committee, has been distinguished from approval power. “Oversight power is an after-the-fact power to review transactions that have been negotiated and executed by others.” *Brown v. U.S.*, 86 F.3d 1554, 1562 (C.A. Fed. 1996). Accordingly, we

conclude the Charter does not provide the Committee with independent authority to approve audits or to exercise control over the execution of the Bid to Goal Programs established under MOU.

This does not mean the Committee is without any role in examining these programs as they exist in a City department. The City Auditor may examine the records of any City department. S.D. Charter § 39.2. The Committee may direct the Auditor to perform a separate and broader audit of these departmental programs, so long as the Auditor “follow[s] Government Auditing Standards.” *Ibid.*⁷ The Committee’s meetings provide a venue for the Auditor’s reports, which could illuminate any internal control deficiencies uncovered during audits. Such public discussions could provide the pertinent decision-makers with incentives to implement any corrective changes the City Auditor may recommend.

CONCLUSION

The existing MOU governing the Bid to Goal Programs do not contemplate a role for the Audit Committee in those programs. The City Charter also does not authorize the Audit Committee to exercise control over any aspect of the Bid to Goal Programs established by MOU and ratified by the City Council. However, the Charter permits the Committee to direct the City Auditor to perform a broader audit of these departmental programs pursuant to Government Auditing Standards, and to provide a venue to review the Auditor’s results in order to encourage implementation of any recommended improvements or changes.

Respectfully submitted,

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cc: Honorable Mayor and City Councilmembers
Eduardo Luna, City Auditor
Andrea Tevlin, Independent Budget Analyst

⁷ The Auditor explains that audits under Government Auditing Standards “include performance and financial audits, and attestation engagements” in his Audit Handbook, Section 1, available at his website http://www.sandiego.gov/auditor/pdf/auditmanual_s1.pdf